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9 *An application for *pro hac* admission is being filed
contemporaneously herewith

10 Counsel for Defendant
11 Petaluma Health Center, Inc.

12 **UNITED STATES DISTRICT COURT**

13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 THURMAN JOHNSON, individually and on
behalf of all others similarly situated,

Case No.:

15 *Plaintiff,*

**DEFENDANT PETALUMA HEALTH
CENTER, INC.’S NOTICE OF
REMOVAL PURSUANT TO 42 U.S.C. §
233(l)(2) AND 28 U.S.C. § 1442**

16 v.

17 **[FEDERAL DEFENDANT]**

18 PETALUMA HEALTH CENTER, INC.

19 *Defendant.*

21 **TO THE CLERK OF THE ABOVE-ENTITLED COURT:**

22 **PLEASE TAKE NOTICE** that pursuant to 42 U.S.C. § 233(l)(2) and 28 U.S.C. § 1442,
23 and on the grounds set forth below, Defendant Petaluma Health Center, Inc. (“Petaluma Health”)
24 hereby removes to this Court the civil action of Plaintiff Thurman Johnson, styled *Thurman
Johnson, individually and on behalf of all others similarly situated v. Petaluma Health Center, Inc.*,
25 Case No. SCV-273559, commenced on or about June 21, 2023, in the Superior Court of the State
26 of California for the County of Sonoma. A copy of the complaint is attached hereto as Exhibit A.
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1 In support of this Notice of Removal, Petaluma Health states the following:

2 1. Petaluma Health is a community health center recipient of federal grant funds under
 3 Section 330 of the Public Health Service Act (codified at 42 U.S.C. § 254b *et seq.*). As such, and
 4 for all relevant times, Petaluma Health applied for and received federal status as a “deemed” Public
 5 Health Service (PHS) employee for purposes of the protection afforded by 42 U.S.C. § 233(a). This
 6 deemed status is confirmed in a Notice of Deeming Action from the Secretary of the United States
 7 Department of Health and Human Services. *See Declaration of Pedro Toledo (Toledo Decl.), Ex. 1*
 8 (Deeming Application), Ex. 2 (Notice of Deeming Action).

9 2. The protection that Petaluma Health’s deemed status affords is an absolute immunity
 10 from *any* civil action or proceeding resulting from its performance of (or alleged failure to perform)
 11 medical or related functions within the scope of its deemed federal employment. 42 U.S.C. § 233(a),
 12 (g), and (h).

13 3. This action falls squarely within that statutory protection. *See Mixon v. CareSouth*
 14 *Carolina, Inc.*, Case No. 22-cv-00269, 2022 WL 1810615 *4-8 (D.S.C. June 2, 2022) (C.J., Harwell)
 15 (granting deemed health center defendant’s motion to substitute United States, over its objection, in
 16 a putative class action arising out of health center’s alleged failure to safeguard personal and
 17 confidential information of current and former patients); *Ford v. Sandhills Medical Foundation,*
 18 *Inc.*, Case No. 4:21-cv-02307-RBH, 2022 WL 1810614 (D.S.C. June 2, 2022) (same), *appeal filed*,
 19 No. 22-2268 (4th Cir., December 9, 2022); *Doe v. Neighborhood Healthcare*, No. 21-cv-1587, 2022
 20 WL 17663520 at *7 (S.D. Cal. Sept. 8, 2022) (agreeing with *Mixon* and *Ford* that “failures by the
 21 health centers to maintain the confidential nature of the records constituted a medical or related
 22 function” within the meaning of 42 U.S.C. § 233(a)); *see also Kezer v. Penobscot Cnty. Health Ctr.*,
 23 No. 15-cv-225, 2019 BL 141566 at *8 (D. Me. Mar. 21, 2019) (concluding deemed PHS defendants’
 24 accessing the plaintiff’s confidential medical record constituted a related function as “the
 25 performance of quality improvement and quality assurance activities . . . are patently related to the
 26 provision of medical services”) (rejecting argument that “233(a) immunity applies only to ‘medical
 27 malpractice’ claims against medical providers involving improper medical treatment, not to a breach
 28 of the duty created by HIPPA (*sic*) to safeguard Ms. Kezer’s medical records”) (noting also the

1 Government “conced[ed] . . . that the ‘maintenance of the confidentiality of [the plaintiff’s] mental
 2 health medical records constituted a covered medical or related function’ under the language of §
 3 233(a).” *Id.* at 2019 BL 141566, at *6 (quoting Government’s brief); *Mele v. Hill Health Ctr.*, No.
 4 3:06-cv-00455, 2008 WL 160226, at *3 (D. Conn. Jan. 8, 2008) (concluding claim resulting from
 5 improper disclosure of medical information “concern[ed] the medical functions of providing
 6 treatment and the related function of ensuring the privacy of patient medical information,” and was
 7 “covered by section 233(a)” immunity); *but see Marshall v. Lamoille Health Partners, Inc.*, No.
 8 2:22-cv-166, 2023 WL 2931823, at *4 (D. Vt. Apr. 13, 2023), *appeal filed*, No. 23-800 (2d Cir.,
 9 May 12, 2023).

10 4. According to the operative complaint, this civil action arises out of Petaluma
 11 Health’s alleged failure to secure and safeguard protected health information and other confidential
 12 information (referred to herein collectively as Protected Information or “PI”) related to the provision
 13 of health care services to its patients. The complaint alleges, in essence, that: (1) Petaluma Health
 14 owes a duty to plaintiff and the putative class members—arising out of their patient-provider
 15 relationship—to implement and maintain reasonable and adequate systems and procedures for
 16 protecting and safeguarding the confidentiality of their PI against loss and unauthorized use; (2)
 17 Petaluma Health breached that duty by failing to implement and maintain reasonable security
 18 procedures and practices to protect plaintiff and the putative class members’ PI from unauthorized
 19 access and disclosure; and, as a result, (3) a party gained unauthorized access to and stole plaintiff
 20 and the putative class members’ PI from Petaluma Health’s electronic health record system. Ex. A.,
 21 Compl., at ¶¶ 1-11, 51-53.

22 5. Plaintiff seeks damages and other remedies based on claims of negligence, invasion
 23 of privacy, unjust enrichment, breach of implied contract, violations of California Confidentiality
 24 of Medical Information Act, Cal. Civ. Code § 56, *et seq.*, violations of California’s Unfair
 25 Competition Law, Cal Bus. & Prof. Code§ 17200, *et seq.*, and violations of California’s UCL Unfair
 26 Business Practice Act§ 17200. *Id.* at ¶¶ 130-231.

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JURISDICTION

Deemed Federal Employee Removal—42 U.S.C. § 233(l)(2)

3 6. The Court has jurisdiction under 42 U.S.C. § 233(l)(2), a federal officer removal
4 statute enacted specifically for the benefit of deemed PHS employees (such as Petaluma Health).
5 Section 233(l)(2) provides a deemed individual or entity the right to a federal forum for a judicial
6 determination as to the availability of a federal immunity defense. *Campbell v. S. Jersey Med. Ctr.*,
7 732 F. App'x 113 (3d Cir. 2018) (recognizing this statutory purpose of § 233(l)(2)); *see also Booker*
8 *v. United States*, Case No. 13-1099, 2015 WL 3884813 *7 (E.D. Pa. June 24, 2015) (recognizing
9 “removal pursuant to § 233(l)(2) serves the same purpose as procedure contemplated by [28 U.S.C.]
10 § 2679(d)(3)”). The PHS Act imposes no time limit on § 233(l)(2) removals. *Estate of Booker v.*
11 *Greater Philadelphia Health Action*, 10 F.Supp.3d 656, 665-66 (E.D. Pa. 2014) (“The fact that §
12 233(l)(2) was added to a statutory scheme in which suits against health centers were removable at
13 any time before trial provides a basis to infer that Congress intended the same time frame to govern
14 removals by the health centers themselves”); *Campbell*, 732 F. App'x 113 (42 U.S.C. § 233(l)(2)
15 removal is not permitted *after* entry of default judgment as that is no longer “before trial” within the
16 meaning of § 233(c)); 42 U.S.C. § 233(c) (permits Attorney General to remove state actions on
17 behalf of actual and deemed PHS employees “any time before trial”). Given the commanding
18 language and unmistakable thrust of § 233(l), this provision should be broadly construed to facilitate
19 the removal, hearing, and judicial determination expressly contemplated therein. Cf. *Willingham v.*
20 *Morgan*, 395 U.S. 402, 406–407 (1969) (construing federal officer removal statute, 42 U.S.C. §
21 1442, broadly in favor of a federal forum to ascertain the availability of a federal defense arising out
22 of official conduct). Section 233(l)(2), like the general officer removal statute (28 U.S.C. § 1442),
23 operates as an exception to the well-pleaded complaint rule. *Campbell*, 732 Fed. Appx. at 117 (“For
24 section 233(l)(2) to have any effect, a district court must at least have jurisdiction to substitute the
25 United States when it is appropriate to do so.”).

Federal Officer Removal—28 U.S.C. § 1442

27 7. The Court also has jurisdiction under 28 U.S.C. § 1442(a)(1), the general officer
28 removal statute. Section 1442(a)(1) affords a right of removal to “any officer (or any person acting

1 under that officer) of the United States or of any agency thereof, sued in an official or individual
 2 capacity for any act under color of such office.” 28 U.S.C. § 1442(a)(1). The statute permits removal
 3 even when the underlying federal question arises only as a defense to a state-law claim. *See Jefferson*
 4 *County v. Acker*, 527 U.S. 423, 431 (1999); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 644 n.12
 5 (2006) (noting federal officer removal statute operates as an exception to the “well-pleaded
 6 complaint” rule). The general officer removal statute protects important federal interests and must
 7 be broadly construed in favor of a federal forum. *See Colorado v. Symes*, 286 U.S. 510, 517 (1932)
 8 (“It scarcely need be said that such measures [allowing for federal officer removal] are to be liberally
 9 construed to give full effect to the purposes for which they were enacted.”), *Willingham*, 395 U.S.
 10 at 406–07.

11 8. Pursuant to 42 U.S.C. § 1442(a)(1), Petaluma Health is a federal officer. When
 12 broadly construed, as required, the phrase “any officer” in § 1442 can be read to include Petaluma
 13 Health as it is “deemed to be an employee of the Public Health Service” under a federal statute that
 14 not only affords Petaluma Health a federal immunity defense but affords an additional removal right
 15 as well.

16 9. Alternatively, Petaluma Health qualifies as a person acting under a federal officer.
 17 *Agyin v. Razmzan*, 986 F.3d 168, 177 (2d Cir. 2021) (holding that (a) individual deemed PHS
 18 employee’s removal under 42 U.S.C. § 1442 was proper because, as an employee of a deemed health
 19 center entity, he was acting under a federal officer with respect to medical and related functions
 20 performed on behalf of the health center entity, and (b) deemed PHS employee enjoyed “the same
 21 legal immunity that is extended to employees of the Public Health Service”); *see also* H.R. Rep.
 22 104-398, reprinted in 1995 U.S.C.C.A.N. 767, 774 (indicating congressional intent that deemed PHS
 23 employees be “covered for malpractice claims under the [FTCA] in the same manner as are
 24 employees of the Public Health Service”); *see also Friedenberg v. Lane Cnty.*, 68 F.4th 1113 (9th
 25 Cir. May 19, 2023) (reversing district court’s denial of substitution in a state court action deemed
 26 PHS employees removed to federal court pursuant to 28 U.S.C. § 1442 and 42 U.S.C. § 233) (citing
 27 H.R. Rep. No. 104-398, at 4, for the point that “Congress intended for deemed PHS employees to
 28 receive protection ‘in the same manner’ as traditional PHS employees during the coverage period”).

1 10. To invoke § 1442(a)(1), a defendant who is not a federal officer must demonstrate
 2 that (1) he or she or it is a “person” under the statute (2) who acted ‘under color of federal office’
 3 and (3) has a “colorable federal defense.” 42 U.S.C. § 1442(a)(1). As a nonprofit corporation, which
 4 operates a federal grant project on behalf of HHS, Petaluma Health qualifies as a person within the
 5 meaning of § 1442. *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135 (2d Cir. 2008) (finding that the
 6 “term ‘person’ includes corporate persons”). Petaluma Health “acted under” an office of HHS to
 7 “assist, or to help carry out, the duties or tasks of the federal superior.” *Watson v. Philip Morris*
 8 *Cos.*, 551 U.S. 142, 149 (2007); 42 U.S.C. § 254(o) (the central office of the Health Resources and
 9 Services Administration administers Health Center grant program on behalf of the HHS Secretary).
 10 In particular, Petaluma Health is statutorily obligated to serve an area or population that the HHS
 11 Secretary designated as “medically underserved.” *Id.* at 254b(a)(1). Petaluma Health is therefore
 12 supporting the mission of the actual PHS by performing functions that would otherwise fall within
 13 PHS responsibilities.

14 11. Petaluma Health is subject to detailed federal requirements, oversight, and control.
 15 *See* H.R. Rep. No. 102-823 at 5 (“Federal requirements associated with the grants are
 16 administratively burdensome and address all areas of operation.”); *accord Agyin*, 986 F.3d at 177
 17 (concluding community health center was “subject to federal oversight and control” sufficient to
 18 render health center physician “acting under” a federal officer for 28 U.S.C. § 1442(a)(1)). Among
 19 these requirements is the obligation to “have an ongoing quality improvement systems that includes
 20 clinical services and management, and that maintains the confidentiality of patient records.” 42
 21 U.S.C. § 254b(k)(3)(C) (emphasis added) (prohibiting HHS’s approval of a health center’s grant
 22 application absent a determination of compliance with this requirement); *see also* 42 C.F.R. §
 23 51c.110 (“All information as to personal facts and circumstances obtained by the project staff about
 24 recipients of services shall be held confidential, and shall not be divulged without the individual’s
 25 consent. . . .”); 42 C.F.R. § 51c.303 (“A community health center supported under this subpart must
 26 . . . [i]mplement a system for maintaining the confidentiality of patient records in accordance with
 27 the requirements of § 51c.110 of subpart A.”).

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1 12. Petaluma Health’s deemed federal status is irrevocable and affords “the same”
2 federal immunity that an actual PHS employee enjoys under 42 U.S.C. § 233(a). 42 U.S.C. §
3 233(g)(1)(A) (making remedy against United States “exclusive of any other civil action or
4 proceeding *to the same extent* as the remedy against the United States is exclusive pursuant to
5 subsection (a)” (emphasis added), (F) (providing that deemed status is “final and binding” on the
6 Secretary, the Attorney General, and all parties to litigation). For purposes of § 1442, Petaluma
7 Health’s federal defense is “colorable.” to the say the least.

PARTIES

9 13. Defendant Petaluma Health is a California-based nonprofit organization that receives
10 federal funding under Section 330 of the PHS Act (42 U.S.C. § 254b) to operate a community-based
11 health center project that provides primary and related health care services to medically underserved
12 residents in and around Sonoma and Marin Counties, regardless of any individual's ability to pay
13 for the services. *See* 42 U.S.C. § 254b(a), (b), (j), (k). Petaluma Health serves specific geographic
14 areas that the HHS Secretary has designated as "medically underserved." *Id.* at 254b(a)(1). *See Ex.*
15 A, Compl., at ¶ 15, 19.

16 14. According to his complaint, Plaintiff Thurman Johnson is a resident of Petaluma,
17 California and is (or was) a patient of Petaluma Health. *See* Ex. A, Compl., at ¶ 12, 95-96, 131, 162.

STATUTORY FRAMEWORK

15. Under the Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, § 4, 84
Stat. 1868, 1870-71 (1970), codified at 42 U.S.C. § 233, PHS personnel are absolutely immune from
any civil action or proceeding arising out of their performance of medical, surgical, dental or related
functions within the scope of their employment. 42 U.S.C. § 233(a). Section 233(a) extends absolute
immunity to PHS personnel by making the remedy for damages against the United States under the
FTCA the *exclusive* remedy for such actions. *Id.*

25 16. To facilitate the legislative objective of ensuring medical services in underserved
26 areas, 42 U.S.C. § 233(a) shields PHS personnel from personal liability arising out of their
27 performance of medical, surgical, dental, and related functions. Without such protection, reports
28 suggest that the cost of professional liability insurance would greatly hinder or altogether preclude

1 the performance of those duties. *See* § 2, 84 Stat. 1868; H.R. Rep. No. 1662, 91st Cong., 2d Sess. 1
 2 (1970); 116 Cong. Rec. 42,543 (1970) (Rep. Staggers, the House of Representatives sponsor, stating
 3 that PHS physicians “cannot afford to take out the customary liability insurance as most doctors
 4 do,” “because of the low pay that so many of those who work in the [PHS] receive.”). To achieve
 5 its purpose, the grant of absolute immunity to PHS personnel under 42 U.S.C. § 233(a) is “broad”
 6 and “comprehensive.” *Hui v. Castaneda*, 559 U.S. 799, 806 (2010).

7 17. The Federally Supported Health Centers Assistance Act of 1992 (and as amended in
 8 1995) (the “FSHCAA”), codified at 42 U.S.C. § 233(g) *et seq.*, authorizes the Secretary of the U.S.
 9 Department of Health and Human Services (HHS) to extend to certain federally funded health
 10 centers and their officers, directors, and employees (and certain contractors) the same protection
 11 that § 233(a) affords to actual PHS employees. That protection is an “*absolute immunity* . . . for
 12 actions arising out of the performance of medical or related functions within the scope of their
 13 employment by barring all actions against them for such conduct.” *Hui*, 559 U.S. at 806 (emphasis
 14 added); 42 U.S.C. § 233(g)(1)(B) (extending 233(a) immunity to deemed PHS employees “to the
 15 same extent” as it is afforded to actual PHS employees).

16 18. To qualify as a deemed entity for § 233(a) immunity, a health center grantee must
 17 submit an application with detailed information and supporting documentation sufficient for the
 18 HHS Secretary to verify that the coverage should apply to all services provided by the health center
 19 to patients and in certain circumstances non-patients of the center. The applicant is also required to
 20 demonstrate that the health center meets four requirements listed in § 233(h), including a
 21 requirement to “implement[] appropriate policies and procedures to reduce the risk of malpractice
 22 *and the risk of lawsuits arising out of any health or health-related functions performed by the entity.*”
 23 42 U.S.C. § 233(g)(1)(D) and (h) (emphasis added).

24 19. The statute requires the Secretary to make a deeming determination for health centers
 25 and their personnel within 30 days of receipt of such an application. *Id.* at § 233(g)(1)(E). The
 26 application seeks § 233(a) immunity in advance of and with respect to a specific prospective period
 27 (*i.e.*, calendar year). A favorable deeming determination by the Secretary (which confers immunity)
 28 is “final and binding” (42 U.S.C. § 233(g)(1)(D)-(F)) on HHS, the Attorney General, and “other

1 parties to *any* civil action or proceeding.” 42 U.S.C. § 233(g)(1)(F) (emphasis added), with respect
 2 to the designated period.

3 20. By requiring a prompt and advance deeming determination, which constitutes a final
 4 and binding determination on all parties for a specified and prospective period, and conferring
 5 absolute immunity from any action or proceeding resulting from covered conduct for that period,
 6 the FSHCAA is designed to eliminate a federally-funded health center’s need to purchase
 7 (expensive) private professional liability insurance for actions arising out of the performance of
 8 medical or related functions within the scope of their employment and in so doing allows centers to
 9 devote their federal grant funds to patient services (rather than insurance premiums). *See* H.R. Rep.
 10 102-823, pt. 1, at 3 (1992).

11 21. When a civil action or proceeding is brought against a deemed PHS employee, the
 12 entity or individual has a duty to deliver the pleadings to the grantor agency’s designated
 13 representative, which is HHS’s Office of General Counsel (OGC). HHS OGC is, in turn, required
 14 to “promptly” provide copies of the pleadings to the Attorney General and appropriate local U.S.
 15 Attorney. 42 U.S.C. § 233(b).

16 22. Upon notification of a state court action against a deemed individual or entity (which
 17 is confirmed by a Notice of Deeming Action), the Attorney General has a mandatory (non-
 18 discretionary) duty to appear in that court within 15 days of notice of the lawsuit to report whether
 19 the “Secretary has determined under subsections (g) and (h) of [Section 233], that such entity,
 20 officer, governing board member, employee, or contractor of the entity is deemed to be an employee
 21 of the Public Health Service for purposes of this section with respect to the actions or omissions that
 22 are the subject of such civil action or proceeding.” *Id.* at § 233(l)(1). The report to the state or local
 23 court of the HHS Secretary’s deeming determination is—for § 233(l)(1)’s removal purpose—also
 24 “deemed to satisfy the provisions of [42 U.S.C. § 233(c)] that the Attorney General certify that an
 25 entity, officer, governing board member, employee, or contractor of the entity was acting within the
 26 scope of their employment or responsibility.” *Id.* at § 233(l)(1); *Cf.* 28 U.S.C. § 2679(d)(3).
 27 “Naturally, the availability of a judicial hearing does not mean that the Government’s view of the
 28 rights and responsibilities of the parties will be determined to have been in error, but it does mean

1 that the issue will be determined by a judge and subject to appellate review.” *Kezer v. Penobscot*
 2 *Cnty. Health Ctr.*, No. 15-cv-00225-JAW, 2016 BL 516708, at *7 (D. Me. Aug. 15, 2016) (citing
 3 *Hui*, 559 U.S. at 811) (“To be sure, [§ 233(a)] immunity is contingent upon the alleged misconduct
 4 having occurred in the course of the PHS defendant’s duties, but a defendant may make that proof
 5 subject to the ordinary rules of evidence and procedure.”).

6 23. If, despite that mandatory duty, the Attorney General (or his or her authorized
 7 representative) fails to appear in the state court action or proceeding within 15 days of notice of the
 8 state action for the purpose of removing it to federal court, 42 U.S.C. § 233(l)(1) (mandatory
 9 appearance serves a singular purpose), the deemed entity or individual has an absolute right to
 10 remove the matter to the appropriate federal district court, without any time limit for doing so. *Id.*
 11 at § 233(l)(2). Section 233(l)(2) provides “supplemental removals rights to persons in a specific
 12 situation, even though such persons also may sometimes remove under [28 U.S.C.] § 1442,”
 13 which is the general officer removal statute.

14 24. Upon removal, the state court proceeding is stayed, by operation of law, until the
 15 federal district court conducts a “hearing” to determine the proper forum or procedure and issues an
 16 order consistent with its determination. 42 U.S.C. § 233(l)(2).

17 25. The hearing in federal district court following § 233(l)(2) removal allows a deemed
 18 entity or individual to challenge the federal government’s failure or refusal to certify that the deemed
 19 defendant was performing medical or related functions within the scope of its (his or her)
 20 employment as a deemed Public Health Service employee with respect to claims against it (him or
 21 her) and substitute the United States as the only proper defendant in its (his or her) place. Where, as
 22 here, the claim is covered by the deemed defendant’s § 233(a) immunity, § 233(l)(2) ensures that
 23 the United States is substituted as the only proper defendant its place. *El Rio Santa Cruz*
 24 *Neighborhood Health Ctr. v. U.S. Dep’t of Health and Human Servs.*, 396 F.3d 1265, 1272 (D.C.
 25 Cir. 2005); *see also Booker*, 10 F.Supp.3d at 656.

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1 **FACTUAL AND PROCEDURAL BACKGROUND PERTINENT**
 2 **TO THE GROUNDS FOR REMOVAL**

3 26. Petaluma Health submitted deeming applications for itself and its personnel with
 4 respect to calendar year 2023. The HHS Secretary, under 42 U.S.C. § 233(g) and (h), approved the
 5 applications and deemed Petaluma Health and its personnel for purposes of the protections afforded
 6 under § 233(a) *et seq.* See Toledo Decl., Ex. 1 (Deeming Application), Ex. 2 (Notice of Deeming
 7 Action).

8 27. On or about June 21, 2023, Plaintiff filed a civil action against Petaluma Health in
 9 the Sonoma County Superior Court and served Petaluma Health on or about July 3, 2023.

10 28. On July 7, 2023, Petaluma Health delivered (by email) the summons and complaint
 11 to HHS OGC and the United States Attorney for the Northern District of California. See Toledo
 12 Decl., ¶ 8.

13 29. On July 26, 2023, Petaluma Health received by regular mail a notice dated six days
 14 earlier (July 20) from a representative of the United States Attorney for the Northern District of
 15 California to the Sonoma County Superior Court. A copy of the notice is attached as Exhibit B. The
 16 notice asserts that it was provided to the state court “pursuant to 42 U.S.C. § 233(l)(1),” but the
 17 notice “fails” to do what that provision expressly requires—*i.e.*, advise the state “court as to whether
 18 the Secretary has determined *under subsections (g) and (h)*, that [Petaluma Health] is deemed to be
 19 an employee of the Public Health Service for purposes of this section with respect to the actions or
 20 omissions that are the subject of such civil action or proceeding.” 42 U.S.C. § 233(l)(1) (emphasis
 21 added). The “advice” called for, and when given, has a singular purpose: “[s]uch advice *shall be*
 22 *deemed to satisfy the provisions of subsection (c)* that the Attorney General certify that an entity,
 23 officer, governing board member, employee, or contractor of the entity was acting within the scope
 24 of their employment or responsibility.” In this way, § 233(l)(1), which was enacted as a *removal*
 25 statute for the *benefit* of deemed PHS employees, achieves its purpose—it affords a federal forum
 26 to ascertain the availability of a federal defense.

27 30. Here, the appearance of the Attorney General’s representative in state court did
 28 nothing to preserve the status quo or protect Petaluma Health, pending a resolution of its claim to

1 immunity. The Attorney General has, in recent litigation, argued that its appearance in state court
 2 precludes jurisdiction and review under § 233(l), despite that provision's plain text and purpose to
 3 the contrary. In making this argument, the Attorney General has revived a position it correctly
 4 abandoned nearly thirty years ago—that it can be the final arbiter of its own scope certifications. *Cf.*
 5 *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) (noting that “the United States initially
 6 took the position that the local United States Attorney’s scope-of-employment certifications are
 7 conclusive and unreviewable but, on further consideration, changed its position”). Moreover, at the
 8 outset of this program, HHS—“in consultation with the Attorney General”—assured deemed PHS
 9 defendants that the “determination or certification” by the Attorney General as to any “particular
 10 claim or case . . . is subject to judicial review.” HHS Notice of Proposed Rulemaking, Federally
 11 Supported Health Centers Assistance Act of 1992, 59 FR 42790-01, 1994 WL 445120, at *42792
 12 (Aug. 19, 1994); *see also* HRSA, HHS, FTCA, Health Center Policy Manual, § II, K.1 at p. 20
 13 (acknowledging that Attorney General’s “certification or failure to certify is subject to judicial
 14 review”), <https://bphc.hrsa.gov/sites/default/files/bphc/technical-assistance/ftcahc-policymanual.pdf>; *see also* HHS Notice of Proposed Rulemaking, Federally Supported Health
 15 Centers Assistance Act of 1992, 59 FR 42790-01, 1994 WL 445120 (F.R.) (representing, “in
 16 consultation with the Attorney General,” that, with respect to a “particular claim or case,” a
 17 “determination or certification by the Attorney General is subject to judicial review”).
 18

19 31. Because the Attorney General “fail[ed]” to appear and advise the state court of
 20 Petaluma Health’s binding status as a PHS employee for calendar year 2023—to effectuate removal
 21 under § 233(l)(1)—Petaluma Health removed it pursuant to subsection (l)(2). Together, these
 22 provisions recognize that when a health center is deemed for the period in which the events giving
 23 rise to the claim occurred (not when the claim itself is made), a federal forum is the proper place for
 24 the threshold immunity determination.

25 32. It is well settled that immunity determinations ought to be made at the earliest stages
 26 of litigation—in the case in which immunity is asserted—because immunity is not only a defense
 27 against liability but a right to be free from the costs and burdens of litigation altogether. 42 U.S.C.
 28 § 233(l)(1) (requiring the Attorney General to act promptly—within a period that is shorter than a

1 responsive pleading deadline), §233(l)(2) (imposing a stay of proceedings pending a hearing in
 2 federal court and a threshold immunity determination). *Cf. Saucier v. Katz*, 533 U.S. 194, 200–01
 3 (2001) (“an immunity from suit rather than a mere defense to liability . . . like an absolute immunity
 4 . . . is effectively lost if a case is erroneously permitted to go to trial” (citing *Mitchell v. Forsyth*,
 5 472 U. S. 511, 526 (1985))), *Mitchell*, 472 U.S. at 525 (“the essence of absolute immunity is its
 6 possessor’s entitlement not to have to answer for his conduct in a civil damages action”).

PETALUMA HEALTH’S ABSOLUTE IMMUNITY

COVERS THIS ACTION

9 33. As previously stated, § 233(a) provides absolute immunity to deemed PHS
 10 employees “for damage for personal injury, including death, *resulting from the performance of*
 11 *medical, surgical, dental, or related functions, [...] while acting within the scope of his office or*
 12 *employment.”* 42 U.S.C. § 233(a), (g).

13 34. The immunity provided under § 233(a) is not limited to medical malpractice but
 14 encompasses any action or proceeding arising out of “medical . . . or *related functions*”—*i.e.*,
 15 functions that are related to the performance of medical, surgical, or dental functions. 42 U.S.C. §
 16 233(a); *Hui*, 559 U.S. at 806 (immunity is broad enough to “easily accommodate both known and
 17 unknown causes of action”); *Friedenberg v. Lane Cnty.*, 68 F.4th 1113, 1128 (9th Cir. 2023) (“the
 18 scope of § 233 immunity does not depend on whether the claim is framed as one of medical
 19 malpractice, but rather whether the claim is the result of the defendant’s “performance of medical,
 20 surgical, dental, or related functions” (citing 42 U.S.C. § 233(a) and (g)). The agency’s interpretive
 21 FSHCAA regulation reflects the statute’s broad grant of immunity, recognizing (in health center
 22 grant parlance) that § 233(a) covers “acts or omissions related to the grant-supported activity” of
 23 deemed health centers. 42 C.F.R. § 6.6(d); *see also Z.B. ex rel. Next Friend v. Ammonoosuc*
 24 *Community Health Services, Inc.*, 2004 WL 1571988, *4 (D. Me. June 13, 2004) (phrase “related
 25 to” in the FSHCAA regulation recognizes that § 233(a) immunity extends beyond the mere act of
 26 providing medical care); *see also Pinzon v. Mendocino Coast Clinics Inc.*, Case No. 14-cv-05504–
 27 JST, 2015 WL 4967257 at *1 (N.D. Ca. 2015 Aug. 20, 2015) (granting, over objection, motion by
 28 United States to substitute itself in place of deemed health center defendant in civil action asserting

1 claims for, among other things, violation of “the Americans with Disabilities Act,” “Civil Rights
 2 Act of 1964,” and “Health Insurance Portability and Accountability Act of 1996”); *Pomeroy v.*
 3 *United States*, 2018 WL 1093501, at *2 (D. Mass. Feb. 27, 2018) (“The statute must cover a broader
 4 scope of activity than the delineated categories alone, or else ‘related functions’ would be mere
 5 superfluity.”) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) for proposition that statutes
 6 should “be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous,
 7 void, or insignificant”).

8 35. This action against Petaluma Health resulted from its performance (or alleged failure
 9 to perform) “medical … or related functions” within the scope of its deemed federal employment.
 10 42 U.S.C. §§ 233(a), 254(b). The Complaint acknowledges, if not hinges on, the inextricable link
 11 between the provision of health care and the confidentiality of patient information. Ex. A, Compl.
 12 at ¶ 20 (“*as a condition of service*, Defendant *required patients*, including Plaintiff, *to provide*
 13 *copious amounts of sensitive personal and private information*, such as the Private Information
 14 compromised in the Data Breach”) (emphasis added), 96 (“As a *condition to receiving the medical*
 15 *services*, Plaintiff provided his Private Information to Defendant, with the expectation that the
 16 Private Information would be safeguarded against cyberattacks and foreseeable theft and not
 17 disclosed for unauthorized purposes.”) (emphasis added), 138 (“Defendant’s duty to use reasonably
 18 secure measures” to prevent improper access to and misuse of PI “arose as a result of the *special*
 19 *relationship* that existed between Defendant on the one hand and Plaintiff and the Class on the other”
 20 and that “special relationship” arose because plaintiff and the putative class “entrusted Defendant
 21 with their confidential Private Information, *a necessary part [of] receiving services from*
 22 *Defendant*”) (emphasis added), 175 (“Plaintiff and Class Members were required to provide their
 23 Private Information.”), 198 (“As a provider of health care … Defendant is required … to ensure that
 24 medical information regarding patients is not disclosed or disseminated or released without patient’s
 25 authorization, and to protect and preserve the confidentiality of the medical information regarding
 26 a patient”).

27 36. The protection of patient privacy and the maintenance of patient confidentiality have
 28 long been woven into the fabric of care. The classical version of the Hippocratic oath, in translation,

1 provides: “What I may see or hear in the course of the treatment or even outside of the treatment in
 2 regard to the life of men, which on no account one must spread abroad, I will keep to myself . . .”
 3 Ludwig Edelstein, *The Hippocratic Oath: Text, Translation, and Interpretation* (1943). A pledge to
 4 privacy has been included in the code of ethics of nearly all health care professionals in the United
 5 States, beginning with the American Medical Association’s 1847 first Code of Ethics. Institute of
 6 Medicine, Committee on Health Research and the Privacy of Health Information, *Beyond the*
 7 *HIPAA Privacy Rule: Enhancing Privacy, Improving Health Through Research*, 86 (2009),
 8 <https://www.ncbi.nlm.nih.gov/books/NBK9579/>. The current American Medical Association’s
 9 Code of Medical Ethics mandates that “[p]hysicians must seek to protect patient privacy in all
 10 settings to the greatest extent possible,” as “protecting information gathered in association with the
 11 care of the patient is a core value in health care.” American Medical Association (hereinafter
 12 “AMA”), *Code of Ethics* § 3.1.1, *Privacy in Health Care*, <https://code-medical-ethics.ama-assn.org/ethics-opinions/privacy-health-care>; see also AMA *Code of Medical Ethics* § 3.3.2
 14 Confidentiality & Electronic Medical Records, <https://code-medical-ethics.ama-assn.org/ethics-opinions/confidentiality-electronic-medical-records> (“Information gathered and recorded in
 15 association with the care of a patient is confidential, regardless of the form in which it is collected
 16 or stored.”). The Ethics Code further counsels that “respecting patient privacy in other forms is also
 18 fundamental, as an expression of respect for patient autonomy and a prerequisite for trust.” AMA
 19 *Code of Ethics* § 3.1.1 (privacy protections extend to physical, informational, decisional, and
 20 associational forms of privacy); *see also* AMA, *Opinion 3.2.1: Confidentiality*, <https://code-medical-ethics.ama-assn.org/ethics-opinions/confidentiality> (“Patients need to be able to trust that
 21 physicians will protect information shared in confidence. . . Physicians in turn have an ethical
 22 obligation to preserve the confidentiality of information gathered in association with the care of the
 23 patient.”); American Medical Association, *Opinion 3.2.4: Access to Medical Records by Data*
 25 *Collection Companies*, <https://code-medical-ethics.ama-assn.org/ethics-opinions/access-medical-records-data-collection-companies> (“Information gathered and recorded in association with the care
 26 of a patient is confidential Disclosing information to third parties . . . without consent
 27
 28

1 undermines trust, violates principles of informed consent and confidentiality, and may harm the
 2 integrity of the patient-physician relationship.”).

3 37. The statutory structure and design of the Health Center Program recognizes that
 4 privacy and confidentiality are fundamental aspects of medical care from initial patient encounters,
 5 through necessary care coordination, to the use of patient data in required ongoing quality assurance
 6 and quality improvement activities. Indeed, health centers are statutorily mandated, as a condition
 7 of both their receipt of federal funding and their deemed status, to protect and safeguard the
 8 confidentiality of patient information. 42 U.S.C. § 254b(k)(3)(C) (requiring quality improvements
 9 systems that “maintains the confidentiality of patient records”), § 233(h)(1) (requiring “appropriate
 10 policies and procedures to reduce the risk of malpractice and the risk of lawsuits arising out of any
 11 health or health-related functions performed by the entity”); *see also* 42 C.F.R. § 51c.110 (“All
 12 information as to personal facts and circumstances obtained by the project staff about recipients of
 13 services shall be held confidential, and shall not be divulged without the individual’s consent...”);
 14 42 C.F.R. § 51c.303 (“A community health center supported under this subpart must . . . [i]mplement
 15 a system for maintaining the confidentiality of patient records in accordance with the requirements
 16 of § 51c.110 of subpart A.”).

17 38. In the HHS-prescribed deeming application, 42 U.S.C. § 233(g)(1)(D), Petaluma
 18 Health was required to assure HHS it would “implement and maintain systems and procedures for
 19 protecting the confidentiality of patient information and safeguarding this information against loss,
 20 destruction, or unauthorized use, consistent with federal and state requirements.” *See* HHS, Health
 21 Resources and Services Administration, Application for Health Center Program Award Recipients
 22 for Deemed Public Health Service Employment with Liability Protections Under the Federal Tort
 23 Claims Act, at 14, available at <https://bphc.hrsa.gov/sites/default/files/bphc/compliance/pal-2023-01.pdf>. At the same time, Petaluma Health had to acknowledge that its “failure to implement and
 25 maintain systems and procedures for protecting the confidentiality of patient information and
 26 safeguarding this information against loss, destruction, or unauthorized use, consistent with federal
 27 and state requirements, may result in disapproval of [the HHS] deeming application.” *Id.* Because
 28 HHS has identified “confidentiality and security” of patient information as one of the

1 “areas/activities of highest clinical risk for the health center,” a health center applicant is also
 2 required to develop, implement, and document the completion of an “annual health care risk
 3 management training plan for staff members” that included, among other things, training on
 4 “HIPAA medical record confidentiality requirements” and “other applicable medical record
 5 confidentiality records.” *Id.* at 10-11(emphasis added).

6 39. Little analysis is required to recognize that the alleged acts or omissions in the
 7 Complaint are “related to” Petaluma Health’s statutorily required and “grant supported” functions.
 8 42 C.F.R. § 6.6(d). *Compare* Ex. A (Complaint) at ¶ 51 (alleging various “failures” to: “properly
 9 maintain and safeguard its computer system and data,” “maintain an adequate security system to
 10 reduce the risk of date breaches and cyber-attacks,” “train employees in proper handling” of PHI,
 11 “ensure the confidentiality and integrity of electronic PHI,” “implement policies and procedures for
 12 electronic information systems that maintain electronic PHI,” and “protect against reasonably
 13 anticipated threats or hazards to the security or integrity of electronic PHI,” *with* Toledo Decl., Ex.
 14 3, at 40-41 (Petaluma Health’s HHS-Approved Grant Application, explaining that Petaluma Health:
 15 “protect[s] the confidentiality of patient information and safeguard[s] it, consistent with federal and
 16 state requirements,” “manages, analyzes, and identifies all potential risks related to the safety and
 17 security of patient health information,” “conducts a periodic survey of all computer information
 18 systems to determine where electronic Protected Health Information (ePHI) is stored, how it is
 19 transmitted, and which employees have access to that information,” “conducts a periodic survey of
 20 all computer information systems to determine where electronic Protected Health Information
 21 (ePHI) is stored, how it is transmitted, and which employees have access to that information,”
 22 performs a “Risk Analysis … to assess potential risks and vulnerabilities to electronic PHI’s
 23 confidentiality, integrity, and availability,” and “assess[] possible new threats or vulnerabilities
 24 associated with newly implemented systems or software programs.”).

25 40. Among its grant supported activities, Petaluma Health implements “various security
 26 measures to reduce risks and vulnerabilities to a reasonably appropriate level to ensure the
 27 confidentiality, integrity, and availability of all electronic PHI that PHC creates, maintains, stores
 28 or transmits.” *Id.* at 41; *see also id.* (describing Petaluma Health’s confidentiality agreements for all

1 personnel with access to patient information and periodic training on data security policies and
2 practices).

3 41. Courts have recognized claims concerning a deemed PHS defendant’s alleged failure
4 to safeguard confidential patient information as arising out of a “medical … or related function”
5 within the meaning of 42 U.S.C. § 233(a). *See, e.g., Neighborhood Healthcare*, 2022 WL 17663520
6 at *7 (citing *Mixon*, 2022 WL 1810615, and *Ford*, 2022 WL 1810614); *see also Kezer v. Penobscot*
7 *Community Health Center*, 15-cv-225-JAW, 2019 BL 141566 at *6 (D. Me. Mar. 21, 2019) (breach
8 of patient confidentiality claim against deemed PHS employees falls within the scope of § 233(a)
9 immunity, and performance of administrative or operational duties, including the duties the maintain
10 the confidentiality of patient PI, can qualify as “related functions” within the meaning of § 233(a));
11 *Mele*, 2008 WL 160226, at *3 (claim resulting from improper disclosure of medical information
12 “concern[ed] the medical functions of providing treatment and the related function of ensuring the
13 privacy of patient medical information,” and was “covered by section 233(a)” immunity).

14 42. The protection of confidential patient information is not only a medical or related
15 function within the scope of Petaluma Health’s deemed PHS employment, *i.e.*, its health center grant
16 project, 42 U.S.C. § 254b, but this action, to the extent it seeks relief *from Petaluma Health*, is
17 rooted in allegations that it failed to adequately perform such functions. Accordingly, Petaluma
18 Health is immune—*i.e.*, not a proper defendant—pursuant to 42 U.S.C. § 233(a) and (g), and
19 plaintiff’s exclusive remedy with respect to the alleged acts or omissions of Petaluma Health is a
20 claim against the United States under the FTCA. *See* 42 U.S.C. § 233(a) (remedy against United
21 States provided by FTCA “shall be exclusive of any other civil action or proceeding.”).

OTHER PROCEDURAL REQUIREMENTS

23 43. Venue before this court is proper because this Notice of Removal is filed in the
24 federal district court that embraces the place where the local state court matter is pending. *See* 28
25 U.S.C. §§ 1441(a), 84(a).

26 44. Removal pursuant to 42 U.S.C. § 233(l)(2) is timely under the PHS Act's removal
27 scheme because Petaluma Health has filed this notice of removal "before trial." 42 U.S.C. § 233(c).
28 ///

1 45. Removal pursuant to 28 U.S.C. § 1442 is timely under 28 U.S.C. § 1446(b)(1)
2 because Petaluma Health has filed this notice of removal within thirty days of Plaintiff's purported
3 service of process. *Agyin*, 986 F.3d at 175 (officer removals, unlike general removals under 28
4 U.S.C. 1441, are to be construed broadly in favor of a federal forum); *Friedenberg*, 68 F.4th at 1123
5 (same).

6 46. In addition, a copy of this Notice of Removal is being contemporaneously filed with
7 the clerk of the local state court where this action was filed, and notice is being given to plaintiff
8 and the United States Attorney for the Northern District. 28 U.S.C. § 1446(d).

9 47. Pursuant to 42 U.S.C. § 233(l)(2), all proceedings in this case are automatically
10 stayed pending the Court’s hearing and threshold immunity determination. 42 U.S.C. § 233(l)(2)
11 (upon removal, “[t]he civil action … shall be stayed in [“the appropriate United States district
12 court”] until such court conducts a hearing, and makes a determination, as to the appropriate forum
13 or procedure for the assertion of the claim for damages described in subsection (a) and issues an
14 order consistent with such determination”); *Estate of Campbell v. South Jersey Med. Ctr.*, 732 Fed.
15 Appx. 113 (3d Cir. May 1, 2018) (For section 233(l)(2) to have any effect, a district court must at
16 least have jurisdiction to substitute the United States when it is appropriate to do so.”).

CONCLUSION

18 For the forgoing reasons, the Court should, after conducting a hearing pursuant to 42 U.S.C.
19 § 233(l)(2), substitute the United States as the only proper defendant in place of Petaluma Health
20 Center, Inc. in the above-captioned action.

21 | Dated: July 28, 2023

Respectfully submitted,

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7 *An application for *pro hac* admission is being filed
8 contemporaneously herewith

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Petaluma Health Center, Inc.